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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ANTONIO DEJESUS ESQUIVEL,<br>Defendant and Appellant. | A149692<br><br>(Contra Costa County<br>Super. Ct. Nos. 51200237, 51609643) |

Defendant Antonio Dejesus Esquivel appeals from a judgment, after jury verdict, convicting him of first degree murder (Pen. Code, § 187)[1] with true findings on gang and firearm enhancement allegations (§ 186.22, subd. (b)(1); 12022.53, subds. (d), (e)(1)); unlawfully carrying a loaded firearm within an incorporated city (§ 12031, subd. (a)(1)); and active participation in a criminal street gang (§ 186.22, subd. (a)). He was sentenced to an aggregate term of fifty years to life.

On appeal, defendant seeks a new trial, arguing that (1) the admission of gang expert testimony violated his state and constitutional rights as construed in *People v. Sanchez* (2016) 63 Cal.4th 665; and (2) the court's instructions erroneously precluded the jury from considering his theory that he acted in imperfect self-defense. He also contends he is entitled to relief based on the conduct of his trial counsel during plea bargaining. Lastly, he argues, and the People concede, that a remand for resentencing is required for the limited purpose of allowing the court to consider whether to dismiss or

[1] All further unspecified statutory references are to the Penal Code.

strike the firearm enhancement allegation under section 12022.53, subdivision (h), as that statute was amended following sentencing in this case. (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018.)

We concur with the parties that defendant is entitled to a remand for the limited purpose of allowing the court to consider whether to strike or dismiss the firearm enhancement under section 12022.53, subdivision (h). In all other respects, we affirm the judgment.

## FACTS

The charges filed against defendant arose from an incident that took place on the evening of May 22, 2011, when the then 21-year-old defendant killed B.H.[2] (hereinafter referred to as the victim). The evidentiary portion of the trial was presented over the course of 20 days from January 27 to March 2, 2016. The jury heard the testimony of over 30 witnesses and considered over 150 exhibits. In this facts section, we present a basic background of the evidence, including the parties' widely divergent versions of the circumstances of the shooting. In the discussion section, we present additional facts necessary to resolve defendant's appellate contentions.

The People's position at the trial was that defendant had murdered the victim and had not acted in either perfect or imperfect self-defense. On the evening of the shooting defendant armed himself with a loaded hand gun. He and his friend Steven A.[3] drove to the neighborhood where the victim lived; Steven A. was driving while defendant was in the passenger seat. The victim and the victim's friend were standing in the street outside the victim's home. Steven A. stopped the car in the middle of the street and the "passenger door flew open." Defendant exited the car and approached the victim. The victim took a step off the sidewalk and into the street, but soon thereafter he turned to walk back onto the sidewalk. Throughout defendant's approach, he had an

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[2] Pursuant to the California Rules of Court rule 8.90(b)(4)(10), governing "Privacy in Opinions," we refer to the victim by his initials and another person by his first name and last initial.

[3] *Ante*, fn. 2.

"[a]ggressive" and "determined" look of "anger," while the victim displayed a "What's-this-about kind of demeanor" without any "aggression." While standing some distance from the victim and this victim's friend, defendant pulled out his gun and began firing at the two men. At first, the gun appeared to misfire and dislodged a couple of unspent rounds, allowing the victim and his friend to attempt to run away. However, defendant continued to fire the gun and ultimately struck the victim twice. The victim fell to the ground. Defendant followed and, together with Steven A., the two men punched and kicked the victim as he laid on the ground. Defendant and Steven A. got back into the car and fled the scene. The victim stood up and "stumbl[ed] back" over to the sidewalk. The People's forensic evidence established the victim had been shot twice, one bullet entering his left temple and another one entering his chest. The bullet that punctured the lung would have allowed the victim to move, but the other bullet that punctured the aorta and heart would have caused death "within 30 seconds." As the bullets entered the victim's body in a downward trajectory, the pathologist testified that if the victim had been standing, he had to have been leaning forward or bent over at the waist when shot. The pathologist further testified that neither wound had any stippling or soot and that, typically, "[i]f the target surface is within the six to nine inches from the gun barrel, you would see soot. If it's about 18 inches, you would see soot and . . . stippling." "The soot is easily wiped off. The stippling does not wipe off." If the gun was a "larger caliber weapon," the "stippling may happen from 18 inches away. With the smaller caliber," nine inches would be a reasonable range to expect to see stippling, but it depended more on how old the bullet was, how much was the charge in the bullet, and what was the load when the bullet was made. Because the pathologist had not seen any stippling, he opined the gunshot wound entering the chest was not "a close contact wound." While the entirety of the victim's condition, including his hands, indicated he had been in a physical altercation, the victim's injuries on his hands did not indicate that "the hands were used as a weapon." When the pathologist saw the victim, the victim was wearing shorts, with a pocket that contained a key ring with four keys, a bag of Cheetos, and a couple of identification cards.

Defendant's position at trial was that he shot the victim in perfect self-defense. Approximately six months before the shooting, in October 2010, defendant and the victim were involved in a physical altercation. Defendant claimed that during the fighting, the victim had tackled him and sent him over a railing elevated several feet from the ground, but defendant kept himself from falling by holding on to the railing. The victim punched defendant in the face before other men attacked the victim and distracted him from further assaulting defendant. Defendant then fled the area, but a week later someone told him that the victim was mad at defendant and had threatened to "kill" him.

Some six months thereafter, defendant saw the victim on the day of the shooting. Defendant and his friend Steven A. drove to the neighborhood to see a friend of Steven A., and defendant did not know the victim lived in the neighborhood. As Steven A. began to park the car, defendant saw the victim and another man standing on the street corner. Defendant told Steven A. they could not park there, and Steven A. turned the car around and parked facing the opposite direction. Defendant told Steven A. that he would get out of the car quickly, get the friend, and then the three men would go somewhere else. Defendant believed the victim and his friend had not recognized him, so he got out of the car and walked toward the friend's house.

As soon as defendant crossed in front of the car, he saw both the victim and his friend "coming straight at" him and he saw the victim "start reaching in his pocket." When the victim and his friend were "around ten feet" from defendant, defendant drew his gun, cocked it to let the two men know it was loaded, pointed it at the two men, and told them to "[b]ack up[ ] and be cool." Defendant had a gun with him because he and Steven A. had been robbed in 2007, there were many unsafe places, and he needed the gun for protection.

In response to defendant's conduct and statement, the victim stopped and ran toward defendant's left, while the victim's friend turned and ran away to defendant's right. Defendant "slightly" lowered his gun and watched the victim's friend run away. As defendant turned to see where the victim was, the victim "charg[ed] . . . and tackle[d]" defendant. As defendant fell backward, he wrapped his left hand around the victim's

neck to immobilize him and used his right hand – which was holding the gun – to break his fall. The victim punched defendant in the mouth and bit defendant's right hand, forcing defendant to loosen his grip on the victim. As defendant hit the ground, the gun, which was still in his hand, went off. The victim was then on top of defendant and hit defendant in his mouth one time and the victim bit defendant on the left hand. Defendant "slightly" let go of the victim and the victim "instantly [got] slightly up and started reaching for the gun." The victim was pulling on the gun and defendant was trying to keep the gun out of the victim's hand. As the gun was being pulled on by the victim, defendant was pulling away, and as the gun was generally facing towards "us," the gun became looser in defendant's hand to where his hand was "slightly holding it," the victim pulled the gun and then his hand slipped off the gun. As soon as the victim's hand slipped, defendant started shooting the gun in the victim's general direction. Defendant was scared and he fired the gun two or three times. After he fired his gun, the victim pushed himself off defendant and ran away. Believing the victim was still alive, defendant ran back to the car, put the gun in his pocket, and told Steven A. to drive away.

## DISCUSSION

### I. Admission of Gang Expert Testimony Does Not Warrant Reversal

#### A. Relevant Facts

The People's theory at trial was that defendant had intentionally killed the victim to promote respect for defendant's criminal street gang. To establish its claim, the People called as a witness Pittsburg Police Detective Charles Blazer, who was "qualified as an expert in the . . . field of criminal streets gangs," specifically with respect to the "West Boulevard Street or West Boulevard [Norteños] and any groups as to which that group could be affiliated as relevant to this case."

##### 1. Background Gang Information

Blazer provided a brief description of general gang culture, and then provided detailed background information on a Norteño-affiliated gang, known by various names as the "Bully Boyz Crew," the "West Boulevard Crew," and the "223 Block," including the gang's method of communication, iconography (especially member tattoos), history,

rivalries with the Sureños and other gangs, tight associational relationships, criminal history of its members, members' custom of committing those crimes only with other members, and primary criminal activities. Blazer also described the symbolic meaning of various Bully Boyz graffiti representations, tattoos, and social media.

**2. Primary Criminal Activities and Predicate Offenses**

Blazer testified that the Norteño gang's primary activities were murder, assaults with non-deadly and deadly weapons (both firearms and non-firearms), burglary, sales of narcotics including marijuana, methamphetamine, and cocaine, possession of concealable firearms, and other various crimes. The crimes were committed for the purpose of achieving, "respect, revenue and . . . revenge." Blazer opined that, in 2011, the Bully Boyz gang was "a violent gang," in that their members were responsible for "several shootings." The gang members "were being targeted by the Pittsburgh Police Department as well as the Antioch Police Department for several violent criminal acts, including homicide [sic] that had occurred throughout the previous multiple years."

Blazer testified to several predicate criminal offenses for which various Bully Boyz gang members were convicted: (1) voluntary manslaughter committed in July 2005, as substantiated by a certified record of conviction; (2) assault with a firearm, shooting from a motor vehicle, discharge of a firearm with gross negligence, and carrying a concealed firearm in March 2008, as substantiated by a certified record of conviction and testimony of a percipient witness; (3) permitting the discharge of a firearm from a motor vehicle committed in March 2008, as substantiated by a certified record of conviction and testimony of a percipient witness; (4) carrying a concealed weapon committed in November 2008, as substantiated by a certified record of conviction; (5) possession of methamphetamines in January 2009 and possession of narcotics for sale in August 2009, as substantiated by certified records of convictions and testimony of Blazer who was personally involved in the arrest and search of an apartment; (6) possession of marijuana for sale committed in June 2010, as substantiated by a certified record of conviction and testimony of Blazer who was personally involved in the arrest and search; and (7)

attempted murder of a police officer and felon in possession of a firearm in May 2011, as substantiated by a certified record of conviction.

**3. Evidence of Defendant's Gang Membership**

Blazer opined that defendant was a member of the Bully Boyz gang based on numerous factors including:

(1) Defendant's association with known gang members, his wearing of gang clothing, his comments about "being on the Boulevard," as reported in his social media account, his commission of a gang-related crime and being arrested with two known gang members, and graffiti of his moniker or gang name – "King Tar or Avatar" - on gang territory.

(2) Defendant's telephone calls and jail visits with known gang members. Defendant's cellphone had a picture of him with the "Paper Posse" emblem, which also appeared in tattoos sported by another gang member.

(3) Defendant's recorded conversation with Steven A. after they were arrested, in which the men indicated their desire to be placed with "Northerners," a reference to their gang, their desire not to be placed with "scraps," a reference to the rival Sureño gang and its affiliates; defendant's reference to a dispute between the Norteños and another gang; and defendant's repeated references to deterring "snitches" from testifying against defendant and Steven A., demonstrating that defendant had a membership with others who could stop "snitches" from talking or cooperating with the police.

(4) Defendant's full chest tattoo, which included the words "No Warning Shots," and depictions of a revolver and revolver shells, which Blazer opined were symbols associated with the Norteño gang.

(5) On July 25, 2011, after defendant's arrest, Blazer personally "located a shrine" to defendant in the backyard of the home of a known gang member. The shrine included (a) the graffiti words, "Free Tar," with "Tar" being an apparent reference to defendant's gang moniker, (b) the "Paper Posse" emblem; and (c) the words "No Warning Shots," which were the most prominent words on defendant's chest tattoo.

(6) Defendant's letters and drawings, which made references to the Norteño gang and gang members, using his gang moniker, and heavily using Norteño symbols.

(7) Defendant's attacks on two men while in jail. Blazer believed that defendant had attacked one man to remove him from the Norteño gang because the man had assaulted another Norteño gang member. Defendant had attacked another man whose tattoos marked him as a member of a rival gang in conflict with the Norteños.

Blazer summarized the above described testimony, as follows: (1) defendant "had knowledge of the West Boulevard" Norteños criminal activities; (2) "in 2011 there were probably about 30 to 40 Bully Boyz gang members"; (3) defendant was a Bully Boyz gang member in May of 2011 at the time he shot the victim; (4) when he shot the victim, defendant was with another Bully Boyz gang member; and (5) it was "possible," but "not probable," that defendant was only a Bully Boyz affiliate or associate rather than a full-fledged gang member.

In response to a series of hypothetical questions, Blazer testified that: (1) a gang member's reputation would suffer if he was "perceived to have lost a fight with a non-gang member;" (2) "if two gang members drove up to a non-gang member . . . and assaulted that person who [the gang members] had a history with, the offense would be committed in furtherance of the gang . . ."; (3) the crime was "committed for the benefit of and the furtherance of" the Bully Boyz Norteños criminal street gang; and (4) the crime was "gang-motivated" and "consistent with the defendant being an active member of . . . the Bully Boyz."

**B. Analysis**

Defendant contends he is entitled to a new trial because portions of Blazer's testimony constituted "case specific hearsay" and "testimonial hearsay," in violation of state law hearsay principles and his Sixth Amendment right to confront and cross-examine witnesses, as construed by our Supreme Court in *People v. Sanchez, supra,* 63 Cal.4th 665 (*Sanchez*). However, we agree with the People that even if portions of Blazer's testimony should have been excluded under the standards enunciated in *Sanchez*, the improper admission of any testimonial hearsay does not require reversal as it was

harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), and, there is no reasonable probability that defendant would have obtained a more favorable outcome in the absence of the admission of any nontestimonial case-specific hearsay (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)).

**1. *Sanchez***

In *Sanchez, supra*, 63 Cal.4th 665, the Supreme Court outlined new contours for analyzing hearsay claims as related to a gang expert's testimony under state and federal law. (*Id*. at p. 680.) To understand the limited contours of *Sanchez*, we set forth a portion of the decision by our colleagues in Division Eight of the Second District in *People v Meraz* (2018) 30 Cal.App.5th 768 (*Meraz*), review granted Mar. 27, 2019, S253629:

"In *Sanchez*, our high court considered the extent to which *Crawford v. Washington* (2004) 541 U.S. 36 [158 L. Ed. 2d 177, 124 S. Ct. 1354)] [(*Crawford*)] limits an expert witness from relating case-specific hearsay in explaining the basis for an opinion, and it clarified the application of state hearsay rules to that kind of expert testimony. It held the case-specific out-of-court statements conveyed by the prosecution's gang expert constituted inadmissible hearsay under state law and, to the extent they were testimonial, ran afoul of *Crawford*. (*Sanchez, supra*, 63 Cal.4th at pp. 670–671.)

"As is typical in gang-related prosecutions, the gang expert in *Sanchez* testified to his background and experience 'investigating gang-related crime; interacting with gang members, as well as their relatives; and talking to other community members who may have information about gangs and their impact on the areas where they operate. As part of his duties, [he] read reports about gang investigations; reviewed court records relating to gang prosecutions; read jail letters; and became acquainted with gang symbols, colors, and art work.' (*Sanchez, supra*, 63 Cal.4th at p. 671.) He also testified about the gang to which the defendant allegedly belonged, including its primary activities and the convictions of two gang members demonstrating the gang's pattern of criminal activity. (*Id*. at p. 672.) As to the defendant specifically, the expert testified about five contacts

defendant had with police reflected in a STEP notice, police reports, and a field identification (FI) card. The expert was not present during any of the contacts and only related the information recorded by other officers. Based on this information, the expert opined the defendant was a gang member. (*Sanchez*, at p. 673.)

"The defendant challenged the admission of the gang expert's testimony describing the defendant's prior contacts with police, arguing it was testimonial hearsay that violated his confrontation clause rights. (*Sanchez*, *supra*, 63 Cal.4th at p. 674.) The defendant did *not* challenge the admission of the background testimony from the expert, such as his description of 'general gang behavior or descriptions of the. . . gang's conduct and its territory.' (*Id*. at p. 698.)

"The court explained, under *Crawford* and the confrontation clause, a hearsay statement is inadmissible unless it falls within an exception recognized at the time of the Sixth Amendment's adoption or the declarant is unavailable to testify and the defendant had a previous opportunity for cross-examination or that opportunity was forfeited. (*Sanchez, supra,* 63 Cal.4th at p. 680.) Thus, a court's task in evaluating out-of-court statements under hearsay rules and *Crawford* is two-fold: 'The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term.' (*Sanchez*, *supra*, at p. 680.)

"On the state law question, the court drew a line between an expert's testimony as to general background information and case-specific facts. Traditionally, 'an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds,' but experts have not been permitted to convey case-specific hearsay about which the expert has no personal knowledge. (*Sanchez, supra,* 63 Cal.4th at p. 676.) The court defined case-specific facts as 'those relating to the

particular events and participants alleged to have been involved in the case being tried.' (*Ibid.*) An expert may 'testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge.' (*Ibid.*) The court gave several examples of this distinction, one of which pertained directly to gang experts: 'That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang.' (*Id*. at p. 677.)

"The court explained that courts frequently avoided any confrontation clause issues with this kind of expert basis evidence by 'concluding that statements related by experts are not hearsay because they "go only to the basis of [the expert's] opinion and should not be considered for their truth." ' (*Sanchez, supra*, 63 Cal.4th at pp. 680–681.) The court disapproved this reasoning when the expert bases an opinion on case-specific facts about which he or she has no personal knowledge: 'If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner.' (*Id*. at p. 684, fn. omitted.) Because this testimony is hearsay, it implicates *Crawford* and the confrontation clause if the statements are also testimonial and none of *Crawford*'s exceptions apply. (*Sanchez,* at p. 685.)

"The court thus crafted the following rule: 'When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot

logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing.' (*Sanchez, supra,* 63 Cal.4th at p. 686, fn. omitted.) Canvassing confrontation clause cases, it concluded hearsay statements are testimonial if they are made 'primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial.' (*Sanchez,* at p. 689.)

"Turning to the facts of the case, the court concluded the police reports, the STEP notice, and potentially the FI card were case-specific testimonial hearsay, violating the confrontation clause. First, the three contacts with the defendant reflected in police reports compiled by the investigating officers during the investigations of those crimes were 'statements about a completed crime, made to an investigating officer by a nontestifying witness,' which 'are generally testimonial unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial.' (*Sanchez, supra,* 63 Cal.4th at p. 694.) It did not matter that the officers summarized the statements or that the defendant himself was not accused of the crimes. (*Id*. at pp. 694–695.) Second, the sworn STEP notice retained by police recording the defendant's biographical and other information was testimonial because it was a formal sworn statement from a police officer that the information was accurate, and its primary purpose was to collect information for later use at trial. (*Sanchez*, at p. 696.) Finally, the FI card memorializing the contact with the defendant could be testimonial, but the court did not decide the issue because the expert's testimony was unclear and confusing on this point. It noted '[i]f the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial.' (*Id*. at p. 697.)

"The court found the confrontation clause violation prejudicial as to the gang enhancements because the main evidence of the defendant's intent to benefit the gang was the expert's recitation of testimonial hearsay. (*Sanchez, supra*, 63 Cal.4th at p. 699.) In doing so, it took care to note the defendant was not challenging the expert's 'background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory,' which was 'based on well-recognized sources in [the expert's] area of expertise. It was relevant and admissible evidence as to the . . . gang's history and general operations.' (*Id*. at p. 698.)" (*Meraz, supra*, 30 Cal.App.5th at pp. 776-779, fn. omitted.)

**2. Defendant's Contentions Challenging Blazer's Testimony**

Initially, we do not need to address the parties' arguments as to whether defendant's failure to object at trial, before *Sanchez, supra*, 63 Cal.4th 665, was decided, forfeits his claims challenging Blazer's testimony, which issue is currently pending before our Supreme Court. (See *People v. Perez* (2018) 22 Cal.App.5th 201, review granted July 18, 2018, S248730.) Even assuming no objection was required, we conclude defendant has failed to demonstrate his challenge to Blazer's testimony warrants reversal.

Defendant argues that Blazer, during his testimony, "made it clear that the vast majority of his expert opinion" concerning the Bully Boyz gang, "was derived from what *Sanchez* . . . [found] was 'testimonial hearsay' that would be barred by the *Crawford* line of cases absent an opportunity to cross-examine the sources of his information. In support of his argument, defendant appears to challenge all sources of information relied on by Blazer in rendering his opinions of the Bully Boyz gang and its members. Thus, defendant specifically complains that Blazer was permitted to testify that he had (1) "two to three hundred conversations" with gang members and informants that were admittedly related to specific police investigations of completed crimes; (2) obtained information about gangs from formal "debriefings" of several gang members, which were not casual conversations "but typically a formal interrogation in which a gang member tells everything he knows about a gang, presumably in consideration for leniency or other

consideration in the context of a criminal investigation;" and (3) 25 "casual conversations" which were "likely testimonial hearsay," because police officers "typically don't engage in 'casual conversations' with suspected criminals or witnesses to criminal activities," and "at a minimum, 'testimonial hearsay' would include police interrogations, . . . thus implying that witness statements to police officers are typically testimonial," and would include "less formal field interviews."

"[T]o the extent defendant's scattershot approach targets the underlying sources of [Blazer's] training, knowledge and expertise, his aim is off the mark. The *Sanchez* court specifically exempted from scrutiny 'an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field.' (*Sanchez, supra,* 63 Cal.4th at p. 685.) As another court has recently observed: 'Under *Sanchez*, facts are only case specific when they relate '*to the particular events and participants* alleged to have been involved in the case being tried,' which in *Sanchez* were the defendant's personal contacts with police reflected in the hearsay police reports, STEP notice, and FI card. (*Sanchez, supra,* 63 Cal.4th at p. 676, italics added.) The court made clear that an expert may still rely on general "background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory," which is relevant to the "gang's history and general operations." (*Id.* at p. 698.) This plainly includes the general background testimony [the expert officer] gave about [the gang's] operations, primary activities, and pattern of criminal activities, which was unrelated to defendants or the current [crimes] and mirrored the background testimony the expert gave in *Sanchez*. It also falls in line with the *Sanchez* court's hypothetical example that an expert may testify that a diamond tattoo is "a symbol adopted by a given street gang" and the presence of the tattoo signifies the person belongs to the gang. (*Id.* at p. 677.) By permitting this type of background testimony, the court recognized it may technically be based on hearsay, but an expert may nonetheless rely on it and convey it to the jury in general terms. (*Id*. at p. 685.) Thus, under state law after *Sanchez,* [the expert officer] was permitted to testify to non-case-specific general background information about [the gang], its rivalry with [another gang], its primary activities, and its pattern of

criminal activity, *even if it was based on hearsay sources like gang members and gang officers*.' " (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411 (*Vega-Robles*).)

By his arguments, defendant incorrectly assumes that all contacts between Blazer and purported gang members are testimonial. We do not agree. We see nothing in Blazer's testimony concerning his "interactions with gang members" that "objectively indicates the primary purpose of [his] questioning was to target . . . individuals or crimes for investigation or to establish past facts for a later criminal prosecution. . . . [T]hat he used [the information he had gathered] to testify as a gang expert at trial does not mean his *primary purpose* in obtaining this information was to use it against [defendant] in a later criminal prosecution. Day in and day out such information would be useful to the police as part of their general community policing responsibilities quite separate from any use in some unspecified criminal prosecution." (*People v. Valadez* (2013) 220 Cal.App.4th 16, 36.) "To conclude otherwise would eviscerate the role of gang experts in gang-related prosecutions, a consequence the court in *Sanchez* neither contemplated nor likely intended." (*Meraz, supra*, 30 Cal.App.5th at p. 782, fn. omitted.)

We are similarly not persuaded by defendant's contentions that as Blazer's testimony about predicate acts and current gang membership of the Bully Boyz was case specific, he improperly conveyed "testimonial hearsay" to the jury. To establish that an organization is a criminal street gang, the prosecution must prove, among other things, that the group has engaged in a pattern of criminal conduct, and this requires a showing that the group has engaged in the requisite number of enumerated predicate offenses. (§ 186.22, subd. (e).) *Sanchez* defined case-specific facts to be facts "relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676.) Contrary to defendant's contention, the evidence of "[t]he predicate offenses used in this case" and Blazer's testimony concerning the current membership of the Bully Boyz gang, "do not fall within this definition; they did not involve the particular events or participants involved in the case being tried. Rather, they are historical facts related to the gang's conduct and activities. These facts pertain to the gang as an organization and are not specific to the case being tried. They establish

that the 'organization, association, or group' has engaged in a 'pattern of criminal gang activity' and is thus a criminal street gang (§ 186.22, subd. (f)) *irrespective of the events and participants in the case being tried*. A predicate offense and the underlying events are essentially a chapter in the gang's biography. Thus, they are relevant to a gang expert's opinion about whether a group has engaged in a pattern of criminal gang activity and is a criminal street gang under the statutory definition. Moreover, predicate offenses are specific examples of the gang's primary activities and thus such evidence is relevant to the gang expert's opinion about the primary activities of the gang. Consequently, the facts related to the predicate offenses here are more appropriately characterized as background information relevant and admissible to the past 'conduct' of the [Bully Boyz] and the gang's 'history and general operations.' [Citation.] We agree with the courts in *Vega-Robles* and *Meraz* that a gang's ' "operations, *primary activities, and pattern of criminal activities*" ' are background facts, not case-specific facts, under *Sanchez* and a gang expert is permitted to testify about such things, even if that testimony is based on hearsay sources. (*Vega-Robles, supra,* 9 Cal.App.5th at p. 411, italics added . . . .)" (*People v. Blessett* (2018) 22 Cal.App.5th 903, 944–945, fn. omitted, review granted Aug. 8, 2018, S249250 (*Blessett*); see *Meraz, supra*, 30 Cal.App.5th at pp. 781-782.) Accordingly, we conclude Blazer's "testimony about the predicate offenses [and current gang membership] here did not violate the rules in *Sanchez*." (*Blesset, supra,* at p. 945.)

Nor are we persuaded by defendant's challenge to Blazer's testimony concerning the gang's current membership to the extent it is based on out-of-court statements by individuals admitting to gang membership on the ground that such information is case-specific hearsay rather than general background information about the gang. In support of his claim defendant cites to *People v. Ochoa* (2017) 7 Cal.App.5th 575 (*Ochoa*). "In *Ochoa*, the expert testified that people involved in the predicate offenses had admitted their gang membership. The *Ochoa* court concluded that these admissions were case-specific facts. The totality of the court's analysis on this is as follows: 'It seems clear the hearsay at issue in the present case—out-of-court statements by individuals admitting being members of the [gang]—are case-specific hearsay rather than general background

information about the [gang]. *Sanchez* gave the following as one in a series of examples of the distinction: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." [Citation.] *By analogy, that someone admitted being a gang member is also a case-specific fact.*' (*Ochoa*, at pp. 588–589, italics added.) But in the *Sanchez* court's example, it is not clear whether the court was referencing a hypothetical associate who was a participant in the events 'involved in the case being tried' (*Sanchez, supra,* 63 Cal.4th at p. 676) or a fellow gang member not involved in the case, but who had otherwise committed an unrelated predicate offense. We think the *Sanchez* court meant the former, not the latter, as an example of a case-specific fact. We arrive at this conclusion because: (1) the issue before the *Sanchez* court did not relate to facts underlying predicate offenses, but rather related to facts establishing the defendant's gang membership (gang experts often look to past and current occasions when a defendant was in the company of gang members as indicia of the defendant's gang membership), and (2) the court's explanation of background facts includes facts related to the conduct, history and operations of the gang. Consequently, we do not agree with the *Ochoa* court's conclusion that the *Sanchez* example has application to predicate offenses. Accordingly, to the extent that *Ochoa* can be read as holding that all predicate offense testimony is case-specific hearsay, we respectfully disagree." (*Blessett, supra,* 22 Cal.App.5th at p. 945, fn. 21.) For the same reasons, we disagree with *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1248–1249 (*Iraheta*), to the extent that decision can be read as holding that statements regarding current gang membership are case specific in all cases, and we similarly disagree with *People v. Lara* (2017) 9 Cal.App.5th 296, 336–337, to the extent that decision can be read as holding that testimony regarding predicate offenses is case specific in all cases.

We also see no merit to defendant's challenges to Blazer's testimony concerning defendant's tattoo and the "shrine" devoted to defendant. Blazer testified he saw the shrine in a known gang member's home backyard, and the officer authenticated photographs of defendant's tattoo and the shrine, which were admitted into evidence. Then, as permitted by *Sanchez*, Blazer relied on his background knowledge and expertise to proffer his opinion that defendant's tattoo and the shrine contained Bully Boyz gang symbols, which supported the witness's conclusion that defendant was a gang member. (*Sanchez*, *supra*, 63 Cal.4th at p. 677; see *Iraheta*, *supra*, 14 Cal.App.5th at p. 1248 [police officers' personal observations of gang tattoos were not hearsay]; *Vega-Robles*, *supra*, 9 Cal.App.5th at p. 413 [court allowed gang expert's testimony concerning case-specific facts about which he had personal knowledge]; compare *People v. Martinez* (2018) 19 Cal.App.5th 853, 859 [gang expert's analysis of gang tattoos violated *Sanchez* because the existence of the "tattoos [was] not independently proven by competent evidence" such as "[p]hotographs . . . or eyewitness testimony"].)

We see no reason to further address defendant's contentions regarding other aspects of Blazer's testimony. Contrary to defendant's contention, Blazer's sources of information were not almost entirely based on testimonial or case-specific hearsay. To the extent some of Blazer's testimony violated the standards in *Sanchez* (e.g., reliance on police reports), there is no question but that the record includes substantial admissible evidence from which the jury could find defendant was a gang member and he had committed the crime for the benefit of the gang. Moreover, once the jury rejected defendant's self-defense claim, there was overwhelming evidence from which the jury rationally found defendant was guilty of first-degree murder regardless of his motive for committing the crime. Accordingly, we conclude that to the extent any portion of Blazer's testimony can be construed as conveying to the jury testimonial hearsay, any error was harmless beyond a reasonable doubt (*Sanchez*, *supra*, 63 Cal.4th at p. 689), and, even if some of Blazer's testimony can be construed as case specific premised on inadmissible hearsay, there is no reasonable probability that defendant would have

obtained a more favorable result in the absence of the error (*Watson, supra*, 46 Cal.2d at p. 836).

## II. Imperfect Self-Defense Instruction Does Not Warrant Reversal

### A. Relevant Facts

Defendant claims the court committed prejudicial error in a portion of its instructions to the jury regarding self-defense. He specifically contends the jury was precluded from considering whether he acted in imperfect self-defense when he fired his gun at the victim. Because we consider " 'the correctness of jury instructions . . . from the entire charge of the court, not from a consideration of the parts of an instruction or from a particular instruction' " (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016), our analysis considers the court's instructions relating to both perfect and imperfect self-defense.

At the parties' requests, the trial court instructed the jury on the concepts of perfect self-defense and voluntary manslaughter as a lesser included offense of murder under the theory of imperfect self-defense. (CALCRIM Nos. 505, 571, 3741, 3472, and 3474.) The trial court explained the concept of perfect self-defense using the language in CALCRIM No. 505, as follows, in pertinent part:

"A defendant is not guilty of First or Second Degree Murder, or Voluntary Manslaughter, if he was justified in killing someone in lawful self-defense or defense of another. A defendant acted in lawful self-defense or defense of another if:

"1. The defendant reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury;

"2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself or someone else. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified. . . .

"A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of great bodily injury has passed. This is so even if safety could have been achieved by retreating. . . .

"The People have the burden of proving beyond a reasonable doubt that the killing was not in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty of Murder or Manslaughter."

Immediately after giving CALCRIM No. 505, the court advised the jury using the language in CALCRIM Nos. 3741, 3742, and 3474, as follows, in pertinent part:

"A person who engages in mutual combat or who starts a fight has a right to self-defense only if:

"1. He actually and in good faith tried to stop fighting;

"2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; and

"3. He gave his opponent a chance to stop fighting.

"If a defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight.

"However, if a defendant uses only non-deadly force, and the opponent responds with such sudden and deadly force that a defendant cannot withdraw from the fight, then

a defendant has the right to defend himself with deadly force and is not required to try to stop fighting, communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting. . . .

"A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.

"The right to use force in self-defense or defense of another continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer is capable of inflicting any injury, then the right to use force ends."

The court also advised the jury on the concept of imperfect self-defense using the language of CALCRIM No. 571, as follows, in pertinent part (bolding in original is omitted; challenged portion is italicized):

"A killing that would otherwise be Murder is reduced to Voluntary Manslaughter if the defendant killed a person because he acted in imperfect self-defense or imperfect defense of another.

"If you conclude the defendant acted in complete self-defense or defense of another, his action was lawful and you must find him not guilty of any crime. In that regard, please refer to Instructions 505, 3471, 3472, and 3474 above. The difference between complete self-defense or defense of another and imperfect self-defense or imperfect defense of another depends on whether defendant's belief in the need to use deadly force was reasonable.

"A defendant acted in imperfect self-defense or imperfect defense of another if:

"1. The defendant actually believed that he or another person was in imminent danger of being killed or suffering great bodily injury; and

"2. The defendant actually believed that the immediate use of deadly force was necessary to defend against that danger; but

"3. At least one of those beliefs was unreasonable.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

"*The doctrine of imperfect self-defense does not apply where a person initiates a physical attack or assault with a firearm on another person and by so doing creates circumstances under which his adversary's attack or pursuit is legally justified. To decide whether the defendant committed an assault with a firearm before any attack was committed by [the victim] please refer to Special Instruction #1 at page 43 which defines that offense*. . . .

"The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of Murder."

The CALCRIM instructions recommend that, when appropriate, the court should advise the jury that imperfect self-defense "does not apply when the defendant, through (his/her) own wrongful conduct, has created circumstances that justify (his/her) adversary's use of force." However, at the request of the prosecutor, and over defendant's objection, the court modified the patterned instruction in this case. The court advised the jury, using a pinpoint instruction (quoted language), that the doctrine of imperfect self-defense "does not apply where a person initiates a physical attack or assault with a firearm on another person and by so doing creates circumstances under which his adversary's attack or pursuit is legally justified." At trial, defense counsel objected to the court advising the jury using the language in the pinpoint instruction, arguing that the concept of when an initial aggressor could not rely on self-defense was covered by the court's instructions on perfect self-defense. Defense counsel also complained that the pinpoint instruction was ambiguous and would confuse the jury because there was no evidence that defendant had ever physically attacked the victim *before* the gun was discharged. In overruling defendant's objections, the court noted that the pinpoint instruction was based on language in *People v. Enraca* (2012) 53 Cal.4th

735, 761 (*Enraca*), in which the court stated that the imperfect self-defense doctrine "may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." The court modified the *Enraca* language so that the jury was advised that defendant's claim of imperfect self-defense was precluded only if the jury found that defendant had either physical attacked or committed an assault with a firearm, and not if defendant might have committed other "possible felony" offenses as he "got out of the car with a loaded firearm." The court explained, and defense counsel agreed, that the pinpoint instruction precluded a claim of imperfect self-defense if the jury found that defendant had pointed his loaded firearm in the direction of the victim and his friend as they were approaching defendant, as the victim would then be "justified in going after [defendant] to try to defend himself." The court further noted that if the jury believed defendant's testimony that he pulled out his gun only to avoid another confrontation with the victim based on their previous confrontation, and that the victim was the initial aggressor by physically assaulted defendant and throwing "the first punch," then defendant would have a claim of "perfect self-defense. If he is justified in pulling out the gun to defend himself and acting lawfully, then he has perfect self-defense if [the victim] attacks him and poses a risk of death or imminent great bodily harm," and the pinpoint instruction on imperfect self-defense would not apply.

**B. Analysis**

In challenging the court's instruction on the concept of imperfect self-defense, defendant does not renew his arguments challenging the pinpoint instruction on the specific grounds he presented in the trial court. Instead, he now contends that the pinpoint instruction was an incorrect statement of law because it allowed the jury to find that defendant lost his right to imperfect self-defense by initiating the confrontation by assaulting the victim with a firearm, "which doesn't necessarily include an actual

physical attack at all, and does not necessarily involve the use of deadly force." According to defendant, he should not have lost the right to claim imperfect self-defense "simply through the threat or attempt to use deadly force," but that the right to claim imperfect self-defense was lost only when the initial aggressor uses actual physical force or deadly force against the victim. We see no merit to defendant's contention.

We initially conclude that the given instructions on both perfect and imperfect self-defense were correct statements of law as set forth in our Supreme Court's decision in *Enraca, supra,* 53 Cal.4th at 761, which we have quoted above. Similarly, in *People v. Salazar* (2016) 63 Cal.4th 214, our Supreme Court again explained that, " '[I]f one makes a *felonious* assault upon another, or has created appearances justifying the other to launch a deadly counterattack in self-defense, the original assailant cannot slay his adversary in self-defense unless he has first, in good faith, declined further combat, and has fairly notified him that he had abandoned the affray.' " (*Id.* at p. 249.) Thus, the *Salazar* court held that the defendant there could not claim he acted in self-defense because "the evidence did not support a finding that defendant was guilty of only simple assault when he initiated the confrontation by approaching the victim with a cocked gun." (*Ibid*.) The *Salazar* court also found no merit to the defendant's claim that the prosecution failed to disprove that he acted in unreasonable self-defense where "the evidence strongly supported a finding that defendant acted as a deliberate aggressor in the confrontation," and, "[t]hus the jury could have found that the quarrel was . . . intentionally provoked by defendant," and "[t]he instructions . . . informed the jury that unreasonable self-defense has no application when a defendant's wrongful conduct created the circumstances that justified his adversary's use of force." (*Id*. at p. 244.)

Thus, the pinpoint instruction now challenged by defendant correctly advised the jury that the defendant could not claim he acted in self-defense, either perfect or imperfect, if the jury found he was the initial aggressor and had provoked the confrontation by committing an assault with a firearm, by pointing his loaded and cocked

gun at the victim. Contrary to defendant's contention, if the jury believed his testimony that he had no intent to use deadly force against the victim when he pointed the gun at the victim and he had merely committed a simple assault or had brandished his weapon merely intending to force the victim to stop his approach, then the jury would have ignored the pinpoint instruction as it would not be applicable.

*People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*), cited for the first time in defendant's reply brief, is distinguishable. In that case, two named defendants and other companions engaged in a fistfight with rival gang members. (*Id*. at p. 945.) One defendant testified that the victim "approached [and] raised his hand, holding an object that 'looked like a gun.' " (*Ibid*.) Purportedly believing that the victim had resorted to deadly force, the defendant pulled out his gun and fatally shot the victim. (*Ibid*.) Defendant asserted he had fired the gun in defense of himself and his companions. (*Ibid*.) A majority of the appellate court concluded that, under the particular facts there, CALCRIM No. 3472, and CALCRIM No. 517, modified in a fashion similar to the instruction in this case, "misstated the law" because "[a] person who contrives to start a fistfight or provoke a nondeadly quarrel" does not forfeit the right of self-defense (either perfect or imperfect) if his adversary suddenly resorts to deadly force. (*Id*. at p. 943). The *Ramirez* court then held that the jury had been erroneously precluded from considering defendants' claims of *perfect and imperfect* self-defense because the instructions did not permit the jury to find the victim "was *not* legally entitled to use deadly force *if* the jury believed defendants' claim they only intended to use nondeadly force (fistfight) and *presented no deadly threat*" to the victim. (*Id.* at p. 952; italics added.)

In this case, the evidence shows without dispute that the victim and his companion did not aggressively approach defendant until after defendant exited the car with a loaded and cocked pistol. Viewed through the lens of the evidence most favorable to the defense, defendant pointed the gun at the victim and told the victim to stop and then the

victim did not stop but continued to approach and engaged defendant in a physical struggle in an apparent attempt to disarm him. As noted by the courts, "a defendant who assaults his victims with a gun may not set up a valid self-defense claim," either perfect or imperfect, "with evidence he believed the victims also reached for a gun, since they would be justified in meeting deadly force with deadly force." (*Ramirez, supra*, at p. 948; see *Enraca*, *supra*, 53 Cal.4th at p. 761.) Moreover, the pinpoint instruction in this case informed the jury that defendant lost his right to claim imperfect self-defense only if they found he had initiated the confrontation by a physical attack or assault with a firearm. If the jury did not make that finding, then defendant retained his right to claim imperfect self-defense. Alternatively, if the jury found the defendant had initiated the confrontation by assaulting the victim with a firearm, then defendant lost his right to claim imperfect self-defense even accepting defendant's testimony that while he was focused on the victim's friend, the victim physically attacked him in an apparent attempt to disarm defendant. Accordingly, because the trial court's instruction on imperfect self-defense, as well as perfect self-defense, were proper under both the law and facts in this case, defendant's claim of instructional error fails.

## III. Purported Cumulative Error Does Not Warrant Reversal

In his reply brief defendant argues that even though he made no "cumulative error" argument in his opening brief, as an appellate court we should and do consider the prejudicial effect of all errors cumulatively. He then summarily argues that "the cumulative effect of the instructional and *Sanchez* errors rendered [his] trial . . . prejudicial and violated due process." We disagree. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.). Here we have found no merit to defendant's claims of error and, therefore, there is nothing to cumulatively review.

## IV. Trial Court's Denial of Relief Based on Ineffective Assistance of Counsel During Plea Bargaining Does Not Warrant Reversal

### A. Relevant Facts

After defendant was convicted, but before sentencing, the court granted defendant's request to substitute his trial counsel for newly retained counsel (and now appellate counsel) for post-verdict proceedings and sentencing. Newly retained counsel filed a "petition for a writ of habeas corpus," by which defendant sought to vacate the convictions by reason of ineffective assistance of counsel during plea bargaining. According to defendant, the People had made a plea offer of an aggregate determinate term of 32 years before trial and trial counsel failed to tell him that if he accepted the plea offer he would be eligible for parole after serving 15 years under a newly enacted law allowing youthful offenders to seek early parole hearings. He further contends that had he known about the new law regarding early parole hearings, he would have accepted the plea offer. As a consequence of his rejection of the plea offer, and being convicted after trial, he faced a potential sentence of 60 years, 8 months, in state prison, with the earliest parole eligibility date after serving 25 years. After the People filed an opposition and the defendant filed a reply, an evidentiary hearing was held over the course of two days. The court heard testimony from defendant, his mother, and defendant's trial counsel. The parties submitted written closing arguments, at the court's request.

The trial court issued a well-written and comprehensive 16-page decision, denying defendant's request for specific performance of the plea offer of an aggregate determinate term of 32 years. We quote the pertinent portions of the decision in setting forth the applicable legal principles, the relevant facts, as found by the court, and, the court's reasons for its rulings:

"I. Introduction

"[¶] . . . [¶]

"At its core, the defendant's initial petition and arguments subsequent to the evidentiary hearing, appear to make [a claim] of ineffective assistance [on the ground that

[trial counsel] . . . failed to provide him with specific information about new legislation affecting his parole eligibility if he took the plea bargain. Both the defendant's testimony at the evidentiary hearing and his declaration in support of his petition assert that if he had known the specifics of this new legislation he would have accepted the proffered plea agreement. [¶]. . . [¶]

"For the reasons stated below, the court denies . . . his habeas corpus petition. . . . [Specifically, the] court finds that counsel's failure to inform . . . defendant of the recently enacted early parole provision of the Youthful Offender statute constituted ineffective assistance of counsel but that counsel's failure in that regard did not cause prejudice to . . . defendant. [¶] In making these findings, the court relies in substantial part upon its conclusion that certain material statements by . . . defendant in his declaration and in his testimony at the hearing lack credibility.

"II. Applicable Legal Principles

"In deciding this matter, the court is guided by several cases that set forth the . . . principles of law applicable to this particular habeas corpus petition. The seminal case is *Strickland v. Washington* [(1984)] 466 U.S. 668 [(*Strickland*)]. In that case, the Supreme Court held that a criminal defendant raises a claim of constitutional magnitude where the defendant can show that defense counsel's performance both fell below 'an objective standard of reasonableness under prevailing professional norms,' and that the demonstrated deficiency of counsel resulted in prejudice to the defendant. Both the U.S. and California Supreme Courts have affirmed that this basic principle of [*Strickland*] applies in the plea bargaining context. [(*Hill v. Lockhart* (1985) 474 U.S. 52, 57–60; *In Re Alvernaz* (1992) 2 Cal.4th 924, 934–937 (*Alvernaz*).)] . . . .

"The defendant bears the burden of proving counsel's ineffective performance and that the ineffectiveness caused prejudice. [(*Strickland, supra*, 466 U.S at pp. 695–697.)] 'Prejudice' is shown where the defendant demonstrates that it is reasonably probable that he would have taken the plea offer but for counsel's ineffective representation. [(*Lafler v. Cooper* (2012) 566 U.S. 156, 164.)]

"In deciding an ineffectiveness claim the court is entitled to take judicial notice of the court proceedings, the 'trial stance' of the defendant, and the evidence at trial including the defendant's testimony. [(*Alvernaz, supra*, 2 Cal.4th at p. 940.)] The court hearing claims of ineffective assistance is not required to accept defendant's unsupported, self-serving claims. In that regard, *Alvernaz* declares that an uncorroborated or unsupported post-trial claim that a particular plea offer would have been accepted but for counsel's ineffective representation is insufficient to make the showing of prejudice required by *Strickland*. [(*Alvernaz, supra*, at pp. 938–939*;* accord, *In re Resendiz* (2001) 25 Cal.4th 230, 253*; see also, People v. Breslin* (2012) 205 Cal.App.4th 1409, 1421.)]

"[III.] Relevant Facts

"A. Relevant Trial Evidence

"The evidence at trial showed that the defendant armed himself and, along with another gang member, drove to a neighborhood where he did not live ostensibly to visit a friend. When the defendant saw the victim, . . . standing on the street, he exited the car he was in, walked toward [the victim], and shot [him] dead. Other evidence elicited at trial demonstrated that [defendant] was a [Norteño] gang member who had previously been in a fight with [the victim]. After he shot the victim, [defendant] and the driver of the car, . . ., fled the scene of the shooting. A short period of time after the shooting, [defendant] obtained a tattoo that stated[,] 'No Warning Shots[,]' on his torso.

"The defendant testified at the trial. His testimony sought to portray the killing of . . . [the victim] as either an accident or an unfortunate, unreasonable self-defense. Defendant's testimony suggested to the jury that [the victim] had approached him aggressively, had struggled with him for the gun, and in the struggle the gun discharged hitting [the victim]. Alternatively, his testimony suggested that he fired the gun because [the victim] aggressively approached him and he feared that [the victim] was reaching for a gun and would shoot him. He claimed that he fired at least one or more shots in self-defense. The jury completely rejected his testimony and found him guilty of First Degree Murder. This court heard the same evidence and finds that the jury's decision was fully justified based on the evidence. In making this finding, it is this court's view that the

defendant provided false trial testimony regarding major details of the shooting. In particular, the court finds that the defendant's testimony that . . . [the victim] approached him and engaged him in a physical struggle sought to deceive the jury into accepting his suggested self-defense and/or accident claims. The court also believes that the defendant gave much additional false testimony on other aspects of the case such as his own involvement in the [Norteño] street gang and the involvement of other persons in the gang. This court's disbelief about [defendant's] trial testimony has a bearing on this court's view of the credibility of the defendant's declaration submitted with this habeas corpus petition and his credibility when he testified at the evidentiary hearing.

"B. Relevant Facts Re: Plea Discussions

"The court finds that the following credible evidence was developed at the evidentiary hearing ordered by this court . . . .

"[Trial counsel] represented the defendant before and through the trial. He testified that, in the pre-trial phase of the case, he was particularly concerned with trying to obtain a plea offer from the prosecution that would involve a determinate sentence. He testified that such a plea offer was important to him as an attorney because he was concerned that any indeterminate sentence would not give the defendant a definite release date, and that, given his client's gang history and history of events during his incarceration, the release date on an indeterminate sentence might be significantly delayed. [Counsel] testified that after he finally received the prosecution's first plea offer for a determinate sentence of thirty-one years, he had to spend significant time and energy getting the defendant to accept the offer. Defendant['s] . . . initial reaction to the offer was to have [counsel] make a . . . counter-proposal for a lesser period of twenty-four years. Defendant's counter-proposal was rejected and eventually, [counsel] persuaded [defendant] to accept the offer.

"Before the plea was entered, the defendant was involved in an altercation with another inmate [while incarcerated in county jail] and the plea offer was withdrawn. Over the prosecution's objection, [trial counsel] sought to have Judge Mockler enforce

the plea agreement but that request was denied. Thereafter, [trial counsel] continued to pursue another plea offer.

"[Trial counsel] testified at the hearing that he and the defendant had a significant difference of opinion concerning the merits of a possible self-defense claim at trial. [Counsel] testified that [defendant] believed that a self-defense claim would have a strong chance of success; [counsel] indicated that he conveyed to [defendant] that any self-defense claim most likely would not be successful. It appears that this dispute led [defendant to request that counsel] be removed as his attorney. The clerk's minutes reflect that [defendant's] *Marsden* motion was heard and denied by Judge Mockler on January 6, 2016. At that hearing the trial date was set for Tuesday, January 19, 2016.

"On Thursday, January 14, 2016, [a deputy district attorney] communicated with [trial counsel] a new plea offer involving a 32 year determinate sentence. [Record Citation.] By its terms, the offer would expire on Tuesday January 19 in the morning. Over the weekend, [counsel] sought to convince the defendant's mother and other relatives to get [defendant] to accept the offer. [Defendant's mother] testified that she spoke with her son over that weekend and that he said he would accept the plea agreement. She also indicated at some point in her testimony that she conveyed this 'acceptance' to [counsel]. However, [counsel] flatly denies that [defendant's mother] or the defendant ever told him that [defendant] had accepted the thirty-two year offer. The only available documentary evidence indicating what [defendant's mother] told [trial counsel] is a copy of an e-mail from [defendant's mother] to [counsel]. That e-mail fails to indicate anything other than that [counsel's] message to the defendant to accept the deal had been read to the defendant and that the defendant had stated that he would not take a deal for any more than twenty-nine years. [Record Citation.]

"Most importantly, at the hearing [trial counsel] produced his digital file of his schedule for the time period. His records showed that he met with the defendant on January 19, 2016[,] which was the date that the offer was set to expire. [Trial counsel] testified in no uncertain terms that his client rejected the plea offer at that time and that this rejection was conveyed to [a deputy district attorney] after this meeting. As part of

the meeting that day, [trial counsel] and [defendant] began their final preparations for a trial.

"Contrary to [trial counsel's testimony], [defendant] says that in his meeting with [counsel] they either did not talk about the plea offer at all or that he told [counsel] that he had accepted the offer and [counsel] stated that it was 'too late.' [Defendant's] testimony is totally illogical. To suggest that he and [counsel] started preparations for trial at their meeting on January 19 without discussing at all whether he accepted the prosecution's offer defies common sense. Equally illogical is the defendant's suggestion that he conveyed his acceptance of the offer to [counsel], who fervently wanted him to take the offer, but that [counsel] told him it was 'too late.' It is this court's view that had [defendant] conveyed his acceptance of the offer at his meeting with [counsel] on January 19, [counsel] would have promptly and enthusiastically notified the prosecution that an agreement had been reached. On January 19, 2016, if defendant . . . had accepted the prosecution's thirty-two year offer, that would have been the most important item for [counsel] to address immediately. Even if the acceptance had come shortly after the offer's expiration on January 19 in the morning, the court finds that [counsel] would have conveyed the defendant's acceptance of the offer in an attempt to [secure] the prosecution's concurrence to the belated acceptance. After all, the offer was set to expire that very day. Defendant's testimony that the plea offer was not even discussed when he next met with [counsel] or that he did not think to discuss it with [counsel] is not credible and the court rejects [defendant's] version of what happened.

"The court credits [trial counsel's] testimony that the [prosecution's] plea offer was conveyed to [defendant] and that his client simply continued to reject the offer until it expired.

"C. Relevant Facts Re: Youthful Offender Parole Statute

"In October 2015, the California legislature amended the provisions of Penal Code section 3051 to expand its parole eligibility provisions to a larger group of persons defined as 'youthful offenders.' This new legislation had relevance to the possible sentencing in [defendant's] case. While [defendant] was not a juvenile at the time of the

charged offense in 2011, he was young enough to the time of the murder to qualify as a 'youthful offender' under the terms of this new legislation. It appears that [trial counsel] was aware of the possibility that this legislation had been enacted before the trial of this case and had actually discussed it with the defendant in somewhat vague terms. [Trial counsel] testified at the hearing that he did not discuss the specific terms of the new legislation with the defendant and he expressed regret at not doing so. As a consequence, this court cannot find that the defendant had adequate notice of the early parole provisions within the new legislation and that he should be deemed to have understood these provisions when he rejected the thirty-two year plea offer on January 19, 2016.

"However, the court also finds that the evidence presented to this court clearly shows that the new parole eligibility provisions of [Penal Code section 3051] would not have had any effect on the defendant's decision to reject the 32 year plea offer. [Trial counsel] made clear in his testimony that while he thought that it was important to persuade the District Attorney to make an offer that included a determinate sentence, his view of the urgency of the situation was not shared by the defendant. While the defendant eventually accepted the first offer of thirty one years, there was no testimony that his decision depended in any way on his concern for when he might be paroled or be eligible for parole. It seems clear that his acceptance was predicated on [trial counsel's] convincing him that his claim of self-defense was weak and that thirty-one years was as good a result as he could expect if his self-defense claim succeeded at the trial.

"It is also apparent that [defendant and trial counsel] had very different views of the strength of the defendant's self-defense claims and that the defendant's reluctant acquiescence to the thirty-one year plea agreement was not firm once [defendant] agreed to accept that sentence. Indeed, once the prosecution withdrew its initial thirty-one year offer and made a second plea offer for thirty-two years, [defendant] countered that he would only accept twenty-nine years.

"It appears that the attorney-client differences between [defendant and trial counsel] led to the defendant's filing of a *Marsden* motion to relieve [trial counsel]. On the two occasions when the District Attorney made plea offers, defendant . . . initially

choose to try to adopt a strategy of haggling for a lower sentence rather than accept the offer. As to the second offer of thirty-two years, the defendant never accepted the offer. Rather, he sought to counter-propose a sentence of twenty-nine years even though the prosecution had already withdrawn a thirty-one year offer and successfully opposed defendant's motion for specific performance of the thirty one year offer. Taken together, these facts disclose that [defendant] held a view of the strength of his self-defense claim which led him to reject the two plea offers that were made to him. It appears that he believed that his self-defense claim would be completely or partially successful at trial to the extent that he would be either acquitted or, at most, convicted of voluntary manslaughter. [Trial counsel] did not share this view and focused his attention on getting the defendant to accept the fact that self-defense was, as he put it in the football vernacular, a 'Hail Mary' pass.

"Based on the testimony at the hearing and the pre-trial record, this court finds that the defendant had little interest in his parole eligibility or other parole considerations that might have affected his consideration of and involvement in plea discussions. . . ."

"[IV.] Discussion

"A. . .

"B. If [Trial Counsel] Was Ineffective in Failing to Advise the Defendant About New Provisions in [Penal Code Section] 3051, No Prejudice Was Demonstrated

"The court . . . finds that even if [trial counsel's] failure to disclose details of the newly enacted Youthful Offender parole status [(Pen. Code, § 3051)] constituted ineffective assistance, the defendant has failed to prove prejudice. The court is cognizant that a defense attorney's failure to advise a client of the parole consequences of a guilty plea may, in some circumstances, be relevant to [a] defendant's decision to enter a knowing and voluntary guilty plea and thus provide the basis for a claim of ineffectiveness of counsel. [(See *Hill v. Lockhart, supra*, 474 U.S. at p. 60 [erroneous advice about parole eligibility may constitute ineffective assistance if prejudice is alleged and proved].)] Here, the People assert that . . . the difference between parole eligibility

under [Penal Code section] 3051 for a thirty-two year determinate sentence and parole eligibility for an indeterminate term after a conviction for murder would have been the difference between ten years. While the People suggest that this difference can and should be viewed as inconsequential, this court does not necessarily agree. Depending on the specific facts, the difference might have been significant enough to require [trial counsel] [to apprise defendant] of these provisions of law in order to effectively represent his client.

"In this case, however, there was no credible evidence suggesting that, at the time the thirty-two year offer was pending, defendant . . . was concerned about parole in general or parole eligibility in particular. Even when [trial counsel] suggested [that defendant] look into the provisions of the law, [defendant] did not do so until after the trial had started. It was only in February, 2016, after [the] trial had started, that the defendant expressed any desire to see what those provisions were. Both he and his mother . . . testified that he asked his mother to look up the provisions of the law in February 2016.

"The evidence also showed that [trial counsel] believed that [defendant's] having a definite date for release on parole was an important consideration. There is no corresponding indication in the evidence that the defendant was similarly concerned about his parole eligibility when he rejected the thirty-two year offer. In fact, it appears that [defendant's] approach to plea bargaining was largely influenced by his notion that he had a significant chance to win an acquittal or conviction for a lesser-included crime based upon his claim of self-defense. His attempt at haggling over the possible number of years he would receive if he pleaded indicates that he never gave any serious consideration in accepting the second plea offer regardless of what the parole considerations were.

"Defendant's uncorroborated allegation that he would have pleaded guilty to thirty-two years had he known the new, specific terms for parole eligibility set forth in [Penal Code section] 3051 is the type of uncorroborated, self-serving assertion that the California Supreme Court has stated may be rejected out-of-hand in *Alvernaz*, *supra*, [2

Cal.4th at pages] 938–939. [Citations.] However, even if the court does not reject the claim summarily, it still rejects the claim. Rather, this order takes into account the entirety of the record including the testimony heard at the evidentiary hearing. Giving due regard to the weight attributable to the defendant's uncorroborated statements about the importance to him of these new statutory provisions, the court finds the defendant's assertions to be incredible given all the other evidence concerning the evolution of the plea bargaining process in this case. Based upon all of the facts, the court finds that the defendant has failed to establish a 'reasonable probability' that he would have accepted the thirty-two year plea offer had he been told about the new provisions of [Penal Code section] 3051."

**B. Analysis**

The trial court did not err in rejecting defendant's claim of ineffective assistance of trial counsel in the plea bargaining process.

Our Supreme Court has held relief may be sought based on a claim of ineffective assistance of counsel that has resulted in a defendant's decision to reject an offered plea bargain (and proceed to trial) on a motion for new trial or in a habeas corpus proceeding. (See *Alvernaz, supra,* 2 Cal.4th at p. 944.) While defendant filed a petition for a writ of habeas corpus, the court treated the petition as a motion for a new trial, without objection by defendant. Accordingly, we apply the two-step process for evaluating the denial of a motion for a new trial based on a claim of ineffective assistance of counsel. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.) In the first step, "[t]he trial court's factual findings, express or implied, will be upheld if they are supported by substantial evidence. [Citation.]" (*Ibid*.) In reviewing for substantial evidence, "all presumptions favor the trial court's exercise of its power to judge the credibility of witnesses, resolve any conflicts in testimony, weigh the evidence, and draw factual inferences." (*Ibid*.) In the second step, we review "the trial [court's decision] whether, on the facts which it has found, the defendant was deprived of his right to adequate assistance of counsel, that is, whether the defendant has shown that '. . . counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the

defendant would have resulted in the absence of counsel's failings. [Citations.]' [Citation]." (*Id*. at pp. 724–725.) "To the extent" the second step of the process presents "questions of law," we are "not bound by the substantial evidence rule, but [have] ' "the ultimate responsibility . . . to measure the facts, as found by the trier, against the constitutional standard . . . ." [Citation.] On that issue, in short, [we exercise our] independent judgment.' [Citation.]" (*Id*. at p. 725; cf. *Alvernaz*, *supra*, at pp. 944–945 [when claim of ineffective assistance of counsel in the context of a defendant's rejection of an offered plea bargain is considered in a habeas corpus proceeding, the appellate court "undertake[s] an independent review of the record . . . to determine whether petitioner has established by a preponderance of substantial, credible evidence . . . that his counsel's performance was deficient and, if so, that petitioner suffered prejudice"].)

"[I]n order to establish a claim of ineffective assistance of counsel in the context of a defendant's rejection of a proffered plea bargain," the defendant "must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; *and* (2) counsel's deficient performance subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*Alvernaz*, supra, 2 Cal.4th at pp. 936–937, citing to *People v. Haskett* (1990) 52 Cal.3d 210, 248, and *Strickland*, *supra*, 466 U.S. at pp. 687–696; see *Lafler v. Cooper*, *supra*, 566 U.S. at pp. 162–163 [applying *Strickland* standard to a claim of ineffective assistance of counsel during the plea-bargaining process].) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland*, *supra*, at p. 697.) In this case, we need not and do not address whether defendant met his burden of demonstrating that trial counsel's conduct was deficient. Instead, we conclude, as did the trial court, that defendant's claim can be resolved on the ground of his failure to establish prejudice.

"To establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*Alvernaz, supra*, 2 Cal.4th at p. 937.) Our Supreme Court has advised us that, we "should scrutinize closely whether a defendant has established a reasonable probability that, with effective representation, he or she would have accepted the proffered plea bargain." (*Id.* at p. 938.) This is so because of "the ease with which a defendant, after trial, may claim that he or she received inaccurate information from counsel concerning the consequences of rejecting an offered plea bargain. 'It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence . . . .' [Citation.]" (*Ibid.*) Thus, "[i]n determining whether a defendant, with effective assistance, would have accepted the offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain. In this context, a defendant's self-serving statement – after trial, conviction, and sentence – that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*Ibid.*) "[A]n additional factor pertinent (although not dispositive) in determining prejudice may be the defendant's stance at trial. For example, a defendant's trial protestations, under oath, of complete innocence may detract from the credibility of a hindsight claim that a rejected plea bargain would have been accepted had a single variable (sentencing advice) been different. . . . [D]epending upon the circumstances of each case, a defendant's trial stance and particular testimony may be viewed as favorable or unfavorable to his . . . claim." (*Id.* at p. 940, fn. omitted.)

*Alvernaz, supra*, 2 Cal.4th 924, is both instructive and dispositive of defendant's appellate claim. In *Alvernaz*, the petitioner sought habeas corpus relief based on his assertion he had been denied his right to effective assistance of counsel when he made his decision prior to trial to reject a plea bargain offered by the prosecution. (*Id.* at p. 930.) Petitioner had been offered a plea bargain with a maximum five-year sentence, with actual prison confinement of two to two and one-half years, his counsel had misinformed him that if he went to trial he faced a maximum penalty of approximately eight years, with actual prison time of approximately four years, and, after conviction, petitioner learned that he faced the possibility of serving 16 years and 7-1/2 months of prison confinement before being paroled under a life sentence. (*Id*. at pp. 929–931, 945.) In rejecting petitioner's claim that there was a reasonable probability that he would have accepted the plea offer had he been properly advised of his sentencing options, a majority of the Supreme Court explained, in pertinent part:

"Petitioner's statement in his most recent declaration that, had he been given adequate advice, he would have accepted the plea offer, is self-serving and thus insufficient in and of itself to establish prejudice. [Citation.]

"Furthermore, petitioner's statement is insufficiently corroborated by independent, objective evidence. The substantial disparity between the term of prison confinement actually faced by petitioner and the term allegedly represented to him by his counsel, constitutes *some* corroborating evidence. The declarations of petitioner and his trial counsel, however, and the reasonable inferences drawn therefrom, establish that petitioner's decision to reject the plea offer was motivated primarily by a persistent, strong, and informed hope for exoneration at trial, and that any evaluation of precise sentencing options was secondary in his thinking.

"Petitioner suggests in his declaration that a factor supporting his decision to reject the offer was his perception that the magistrate had concerns about the strength of the People's case. He admits he was 'encouraged' by his counsel's optimistic assessment of the chance for an outright acquittal at trial, and was strongly influenced by his counsel's advice not to accept the plea offer. . . .

"Petitioner's trial counsel declares that petitioner, at all times at the pretrial stage, 'adamantly' insisted he was innocent. Furthermore, testifying at trial in his own defense, petitioner maintained under oath his complete innocence, presenting an alibi defense.

"Finally, although petitioner states in his original declaration that had he known he faced 'an actual "real time" sentence of at least 16 years in prison prior to parole, I would have attempted to negotiate a "no contest" plea to the District Attorney's one-count offer …,' there is no evidence substantiating that he was prepared to make such a counteroffer or any other counteroffer, or otherwise engage in the plea bargaining process." (*Alvernaz*, *supra*, 2 Cal.4th at pp. 945–946.)

So, too, in this case, we conclude defendant failed to meet his burden of showing a reasonable probability that had he accurately been informed of his parole eligibility date, he would have accepted the 32 year plea offer. As the trial court acknowledged, defendant's declaration and testimony "that [] had he been given adequate advice, he would have accepted the plea offer, is self-serving and thus insufficient in and of itself to establish prejudice." (*Alvernaz*, *supra*, 2 Cal.4th at p. 945.) Moreover, we reject defendant's argument that the trial court should have found his assertion that he would have accepted the plea offer had he known of his parole eligibility date was sufficiently corroborated by independent, objective evidence. As the trial court noted, the disparity between parole eligibility for a youthful offender sentenced to an determinate term (15 years) and an indeterminate term (25 years) cannot necessarily be said to be insignificant, and constitutes "*some* corroborating evidence." (*Ibid*.) Nonetheless, the trial court rationally went on to find that the record evidence of the plea bargaining process "and the reasonable inferences to be drawn therefrom," demonstrated it was not reasonably probable that defendant would have accepted the plea offer had he known of his parole eligibility date because defendant's rejection "was motivated primarily by a persistent, strong, and informed hope for exoneration at trial, and that any evaluation of precise sentencing options was secondary in his thinking." (*Ibid*.)

In challenging the trial court's ruling, defendant asserts the following circumstances should be considered: (1) he was amenable to a plea offer because he had

accepted a plea offer of a 31-year determinate sentence, with no knowledge of any 15-year parole eligibility date and believing he would have to serve a minimum of 27.2 years; (2) at the time of the 32-year plea offer, he had served four and a half years, and his parole eligibility date under the new law would have been a little over 10 years away, and a chance of being paroled in only 10 years appears too good to have passed up, even considering his unhappiness in the offer having increased a year because of the jail fight; and (3) his earlier acceptance of the 31-year plea offer and his "quibbling over" the extra year added to the revised 32-year offer, shows he did not believe he had a good chance of proving he acted in self-defense and being acquitted at trial. However, defendant's arguments misconstrue our review authority. He is, in effect, attacking the court's factual findings, asking us to reweigh the evidence and draw inferences different than those drawn by the trial court. This we cannot do. We must accept the trial court's factual findings, and the reasonable inferences to be drawn therefrom. "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact . . . . (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

## V. Remand for Resentencing on Firearm Enhancement Under Penal Code Section 12022.53

The jury found true a firearm enhancement allegation under section 12022.53, subdivisions (d) and (e)(1), in connection with the murder charge in count one. At sentencing, the court imposed a term of 25 years to life on the firearm enhancement allegation, to be served consecutively to the 25 years to life term imposed on the first degree murder conviction. At the time of defendant's sentencing, section 12022.53, former subdivision (h), did not permit the trial court to either dismiss or strike a firearm enhancement imposed under section 12022.53, subdivisions (d) and (e)(1). However, after sentencing, Senate Bill No. 620 was enacted (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018), which amended section 12022.53, subdivision (h), to read, in pertinent part: "The court may, in the interest of justice pursuant to Section 1385 and at the time of

sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section."

Defendant argues, the People concede, and we concur, that Senate Bill No. 620 applies to all cases that are not yet final on appeal such as defendant's case. (See generally *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307.) We further agree with the parties that the matter should be remanded for resentencing to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancement. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [" '[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court' "].) Our decision should not be read and we express no opinion on how the court should exercise its discretion under section 12022.53, subdivision (h), on remand.

**DISPOSITION**

The sentence imposed on the firearm enhancement under Penal Code section 12022.53, subdivisions (d) and (e)(1), is vacated. The matter is remanded to the trial court for resentencing limited to determining whether the firearm enhancement should be stricken or dismissed under Penal Code section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018). If the court does not strike or dismiss the firearm enhancement, then the sentence on that enhancement shall be reinstated as originally imposed**.** The trial court is directed to issue a new minute order and an amended abstract of judgment after such resentencing to reflect whether it strikes or dismisses, or reinstates the sentence on the firearm enhancement. The court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____
Petrou, J.

WE CONCUR:

_____
Siggins, P.J.

_____
Wiseman, J.[*]

*A149692/People v. Esquivel*

[*] Retired Associate Judge of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.